

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Application No. 15843 of Donald P. Tuttle and Judith A. Kennedy, as amended, pursuant to 11 DCMR 3107.2, for a variance from the rear yard requirements (Subsection 404.1) for a deck addition to a detached single-family dwelling in an R-1-B District at premises 3038 Newark Street, N.W. (Square 2082, Lot 37).

HEARING DATES: July 28, 1993, February 9 and April 13, 1994

DECISION DATES: October 6, October 14 and December 1, 1993 and May 4, 1994

ORDER

PRELIMINARY PROCEDURAL MATTERS:

The subject application involves a site with a single-family dwelling and an existing deck addition. In an effort to bring the deck into compliance with the Zoning Regulations, the applicants initially requested rear yard, side yard and lot occupancy variances. The initial hearing was held on July 28, 1993. At the end of the hearing, the record was closed except for revised plans from the applicant, responses and proposed findings of fact from the parties. The revised plans were due on September 15, 1993 and other submissions were due on September 29, 1993.

On September 16, 1993, the applicant submitted revised plans. On October 6, 1993, the Zoning Administrator (ZA) submitted a revised memorandum indicating that only a rear yard variance is needed for the site. The application was amended.

At the Public Meeting of October 6, 1993, the Board considered the application. First, the Board considered a request made by Mr. Hornbostel, a party to the application, to waive the Board's rules to accept into the record a letter written by him and submitted on October 6, 1993. The waiver request was made on the grounds that the moving party did not receive proper notice as to when the submissions were due. The Board decided that the letter would assist in its deciding the case, therefore, the Board waived its rules and accepted the letter into the record.

Secondly, the Board considered the applicants' motion of October 4, 1993 to strike from the record the following documents: 1. Letter dated September 28, 1993 from Councilmember James Nathanson, and 2. Letter dated September 27, 1993 from Eleni Constantine, President, Cleveland Park Historical Society. Staff informed the Board that the letters were not from parties to the application and they had been returned. Therefore, no action was necessary on this motion.

Third, the Board noted that the report of Advisory Neighborhood Commission (ANC) 3C lacked elements necessary to accord it great weight. However, by letter dated January 27, 1994, those deficiencies were corrected entitling the ANC to "great weight".

In considering the merits of the case, Boardmember Thornhill's motion to grant the application failed for lack of a second. The Board deferred consideration of the application until its Special Public Meeting of October 14, 1993 and requested that Mr. Clarens read the record and participate in the decision.

At the Special Public Meeting of October 14, 1993, the Board waived its rules to accept into the record the applicant's reply to the letter by Mr. Hornbostel dated October 6, 1993.

Secondly, the Board denied the motion for rehearing filed by the Hornbostels on October 13, 1993.

Third, the Board granted the ANC's request for waiver of the rules to accept into the record its motion to strike Exhibits Nos. 42 and 38. The Board then granted the motion to strike from the record Exhibit No. 42, the revised Zoning Administrator's (ZA) memorandum, because it was based on plans not made part of the record and was not referred to other parties. By striking the revised memorandum from the record, the Board is required to decide the case based on the three variances addressed in the original ZA's memorandum dated May 20, 1993.

Finally, the Board discussed the merits of the case. A motion to deny the application was made and seconded. However, the motion failed for the lack of a majority. (Paula L. Jewell and Angel F. Clarens to deny; Carrie L. Thornhill opposed to the motion; William L. Ensign opposed to the motion by absentee vote).

Having failed to reach a decision in the application, the Board deferred consideration of the application until its public meeting of December 1, 1993. During the period between the October 14 and December 1, 1993 meetings, two of the three Board Members who actually heard the case, Carrie L. Thornhill and Paula L. Jewell, were replaced by new Board Members. The only remaining Board member who actually heard the case was Mr. Ensign, Mr. Clarens had read the record. The three new Board Members were Mr. Ellis, Mrs. Richards and Mr. Evans.

At the public meeting of December 1, 1993, the Board decided to rehear the application based on the revised plans.

The application was readvertised and a rehearing was scheduled for February 9, 1994. By memorandum dated April 3, 1994, the Board requested that the Zoning Administrator submit a report of the

relief needed based on the revised plans. By memorandum dated April 12, 1994 to the Board, the Zoning Administrator stated that, based on the revised plans, a variance from the rear yard requirements (Section 404.1) is needed for the subject property.

On April 15, 1994, the Board requested that the Zoning Administrator address whether his calculations for the lot occupancy included eave projections beyond two feet. The Zoning Administrator sent a memorandum dated April 22, 1994 stating that "the plans and plats outlining the existing structure did not specifically indicate a non-standard eave projection, [therefore] standard eaves of two feet (2') or less were assumed."

Based on communications from the Zoning Administrator, the Board determined that the only area of relief to be considered in the rehearing would be the rear yard variance.

The Board heard a portion of the case on February 9, 1994 and the balance was continued to April 13, 1994. At the end of the hearing on April 13, 1994, the Board left the record open to receive, inter-alia, proposed findings of fact from all parties by April 28, 1994. The application was placed on the decision meeting agenda of May 4, 1994.

On May 4, 1994, the applicants moved to strike from the record the documents submitted by opponents to the application on the grounds that they were filed after the deadline imposed by the Board. The Board determined to deny the motion since the late filings were due, in part, to the late receipt of the Zoning Administrator's memorandum. The Board then moved to decide the application.

#### SUMMARY OF EVIDENCE OF RECORD:

The property which is the subject of this application is located on the south side of Newark Street, N.W., between 30th and 31st Streets, N.W. It consists of one lot of record (Lot 37) that contains 4,500 square feet of land area and is improved with a two-story plus basement, single-family, detached dwelling. It has approximately 50 feet of frontage on Newark Street and does not abut a public alley.

The site is located in the Cleveland Park neighborhood. The immediate area surrounding the site is residential and is developed primarily with single-family, detached dwellings. The neighborhood is well maintained.

The site is located in an R-1-B District which permits matter of right development of single-family detached dwellings with a minimum lot area of 5,000 square feet, a minimum lot width of 50

feet, a maximum lot occupancy of 40 percent, and a maximum height of three stories/40 feet. A 25-foot rear yard is required.

The applicants are seeking variance relief for the deck addition constructed at the rear of the site. Initially, the deck measured 12 x 18 feet with stairs descending into the side yard to the west. The applicants, then revised the deck in the following manner. They removed the stairs, cut the deck back at the south and east and lowered the deck. The deck now occupies 14.3 feet of the rear yard. As a result of the alterations to the original structure, the only relief needed is a rear yard variance because only 10.7 feet of the required rear yard depth remains.

ISSUES AND ARGUMENTS:

1. Whether the property is unique or subject to an exceptional situation or condition?

The applicants testified that their property is unique. They stated that the front of the house is at grade, but the topography slopes so that the rear of the house is seven feet above ground. They stated that the rear yard measures 25 feet from the rear of the house. The yard slopes only slightly (about two-feet) for a distance of approximately 18 feet. For the remaining seven feet, the land descends into a cliff, the bottom of which borders a residential site at 3314 Ross Place, N.W. A retaining wall is located in the rear yard at the top of the cliff.

The applicants stated that the bordering property on Ross Street and the properties on Macomb Street that face the subject site are level in topography.

The applicants maintained that the size of their lot is different from other lots in the area. They introduced into the record maps of the area properties to demonstrate the size difference. They testified that their lot is the shallowest and narrowest of the lots in the neighborhood. They noted that some of the lot six or seven lots away are shallower but longer. Specifically they noted that lot 52, located immediately to the west, is 85 feet by 90 feet for a total of 7,620 square feet. Lot 846 located immediately to the east, is 75 feet wide and 94 to 104 feet deep for a total of 7,470 square feet. This lot is a parallelogram not a rectangle. Lot 17, which is one lot further to the east, is 58 feet wide and 100 feet deep for a total square footage of 5,870. Lot 19 is 58 feet wide by 137 to 189 feet deep for a total of 8,653 square feet. Finally, lot 866, located immediately to the west of lot 52, is 50 feet wide by 197 feet deep with a total of 9,089 square feet. The applicants noted the difference between these properties and their own lot which is 50 feet wide by 90 feet deep for a total of 4,553 square feet.

The applicants also stated that their house sits farther back on the site than other nearby houses, creating a smaller rear yard.

By report dated April 4, 1994, the Office of Planning (OP) recommended denial of the application. OP maintains that the application does not meet the requirements for variance relief.

With regard to uniqueness, OP stated that while the property has a slope in topography, there are many other properties in the block characterized by similar topographical conditions. OP stated that it is unable to find a unique or exceptional condition related to the subject property.

Advisory Neighborhood Commission (ANC) 3C submitted reports dated September 28, 1993 and January 27, 1994, related to the applicants' revised plans. The ANC also testified at the hearing on April 13, 1994. The ANC voted to oppose the application because it does not meet the criteria for variance relief. The ANC stated that the applicant has not shown that the property is unique. The ANC agreed with OP's assessment that many of the other properties in the block are characterized by similar topographic conditions.

By letter dated January 31, 1994, the Cleveland Park Historical Society (CPHS) expressed opposition to the application. The CPHS stated that the applicants' property is in no relevant respect different in its topography from the other properties on the south side of Newark Street between Connecticut Avenue and 34th Street (which includes about 20 houses). The CPHS stated that all of these houses have back yards which slope down to Macomb Street with the last few feet of their back yards being quite steep.

Neighbors in opposition to the application who reside at 3314 Ross Place, N.W., were represented by counsel. Through their counsel they testified that the rear yard is not unique in terms of topography or depth of lot. He stated that the Baist maps supplied by the applicant and OP show that other properties in the area have similar back yards. There is no other characteristic about this property which could be considered unique.

Another neighbor, who resides next door to the site at 3042 Newark Street, N.W., also testified in opposition to the application. She stated that the applicants' house lines up with her house in the front and back. Therefore, the house is not unique in its positioning on the lot. She testified that the main floor of her house is nine feet above ground like in the applicants' house. She stated that the two lots have the same depth but her lot is wider than the applicants' lot. She noted that her lot is 85 feet wide and their lot is 50 feet wide.

The opposing neighbor testified that there is a deck at the rear of her house located next to the kitchen. The back wall of

the kitchen is at the rear and an indentation or L-shape is created there. The deck is located in this indentation and the rear of the deck is even with the rear wall of the kitchen. She noted that her deck does not extend into the required rear yard.

2. Whether the owners of the subject property face a practical difficulty as a result of some unique or exceptional situation related to the property?

The applicants testified that they are faced with a practical difficulty related to the conditions at the site. They testified that the location of the house on the site creates such a small rear yard that no addition can be made to the house without variance relief. Because of the slope in topography, the rear yard is inaccessible from the main floor where the dining and kitchen areas are located. One can only access the rear yard from the ground floor basement level or from the front door 50 feet forward on the site. The applicants' noted that only an 18 foot parcel of land would be usable at ground level.

The applicants testified that they need the deck for a secure play area for their small child and as a place to enjoy the outdoors off from the main floor level.

The applicants stated that the Historic Preservation Review Board is not likely to allow them to expand the house to the front because the property is in an historic district. It has a Victorian porch with a Dutch colonial roof line.

The Office of Planning (OP) stated that it was unable to find a practical difficulty related to the property that would justify granting a variance. OP noted that the proposed deck is to serve primarily as an outdoor extension of the existing dwelling's kitchen. However, OP stated that the applicants could build a matter of right deck that is four feet above ground and extends into 50 percent of the rear yard.

OP stated that the applicants could put a balcony at the rear or they could provide direct access to the rear patio by means of a stairwell from the kitchen to the French doors to the southwest corner of the house.

OP maintains that the applicants are able to make reasonable use of the house without variance relief.

The ANC also stated that it finds no practical difficulty related to the property. The ANC stated that having limited access to the rear yard, creating a secure play area for a child and aesthetic considerations do not constitute the requisite practical difficulty for variance relief. The ANC maintains that the deck is not necessary because the applicants have three porches that

they can use as outdoor space. They can install a safety gate to protect their child. The ANC pointed out that the applicants' rear yard is accessible from the house and the driveway. This access is similar to or better access than that of most houses in the city. The ANC stated that the applicants could install a patio and fence at ground level to enjoy the outdoors. The ANC also agreed with OP's suggestion that the applicants could lower the deck to four feet above ground level.

The neighbor who resides at 3042 Newark Street testified that if the applicants were to install a four foot high deck, it would not be a practical difficulty for the applicants to walk down a few steps from the main floor to the deck.

Neighbors who reside at 3314 Ross Place, N.W., through their counsel, testified that the applicants have not met their burden with regard to practical difficulty. The opposing neighbors maintain that while there is a slope in the topography and a steep drop at the rearmost portion of the site, the topography does not create a practical difficulty for the owners because the steep slope is not located on the portion of the yard where the applicants propose to build the deck, i.e. close to the house. The area close to the house is not steeply sloped and can be used at ground level.

The opposing neighbors further testified that not having a play area at the main level of the house is not a practical difficulty because the situation is only temporary while the child is very young. They believe that the alternatives available to the applicants for using outdoor space make the applicants unable to meet the practical difficulty test.

Responding to some of the issues raised by parties, the applicants' architect testified that a four foot high deck would block the access from the basement door. Also, creating a four foot high deck is not a design solution for clients who need a deck off of the main floor of the house.

The applicants testified that it would be too expensive to raise the grade of the rear yard and raise the retaining wall on the site to use the ground level.

3. Whether allowing the deck would be of substantial detriment to the public good?

The applicants testified that virtually all ten of the houses in either direction from the site have decks. About 75 to 80 percent of the houses on the south side of Newark Street, between Connecticut and Wisconsin Avenues have decks.

The applicants testified that theirs is a conventional garden variety deck. It is not fancy or unsightly. The applicants stated that their deck would not substantially impact the neighborhood or impair the public good given the number of decks in the area.

The applicants' architect stated that their deck is an acceptable size for the area. She testified that the deck was reduced by about 190 square feet to its current dimensions. This reduction was done in response to neighbors who complained about the deck's impact on their property.

The opposing neighbor residing adjacent to the site at 3042 Newark Street testified that the deck has a negative impact on their privacy because one can see inside their kitchen and eating area from the applicants' deck. Before the deck was built, one could not see into their dining room, or onto the rear porch because of their own deck and railing and the closeness of the two houses.

She noted that in remodeling their kitchen, they closed off the side of their house to the west where their other neighbor had a deck. They left it open on the side where the applicants' property is located because they assumed that the applicants would not be able to build a deck.

The applicant stated that they could always see into this neighbor's house because this neighbor had a chain link fence which enabled one to see onto their property. There is a magnolia tree in the neighbors yard that buffers the view from the neighbors' deck to the applicants' deck.

The neighbor stated that she and her husband plan to remove that tree on the recommendation of a landscape expert. She testified that to adequately buffer their property, the applicants would have to plant vegetation 15 to 16 feet tall. She stated that the proposed deck would diminish the value of her property.

The neighbors at 3314 Ross Street live to the south from the applicants at the bottom of the cliff at the rear of the site. They are concerned that their privacy will be affected because people tend to stand along the edge of the deck and look over into their yard. They also maintain that the deck has a detrimental effect on their view because it is located several feet above their own property and it is unsightly to see the understructure of the deck.

To address the aesthetic concerns, the applicants architect testified that there will be lattice work placed around the bottom of the deck and vegetation will be planted to hide the structure from view as much as possible. Therefore, when the neighbors on Ross Street look toward the deck mostly what they will see is the



lattice work, natural vegetation and a very big tree that is located on the applicants' lot. They will see far less of the deck with the changes than otherwise.

The applicants' architect disagreed with the neighbors' assessment of the deck as unsightly. She stated that on the underside of the deck, the neighbors are able to see two by ten joists which are just wood. The deck is well constructed. The pickets and balusters are traditional but the deck is in keeping with the style of the house.

With regard to the size of the deck, the architect testified that the deck measures 12 feet by 24 feet plus the stairs. It does not have outrageous proportions, the dimensions are common and reasonable in terms of the size of the house and the use it was designed for. The deck's dimensions are acceptable for the neighborhood.

The Office of Planning stated that the revised plan represents a substantial reduction in the overall size of the deck from what was presented in the original plan. The revised plan also eliminated the need for variance from the width of side yard requirement by redirecting a flight of stairs from the west side yard to the rear yard. However, this course of action would extend more of the deck into the rear yard since the portion of the stairs that is over four feet above grade is considered a part of the deck.

OP further stated that while the deck is not visible from the adjoining property to the south (rear) because of the down-slope and natural vegetation, it considerably reduces the level of privacy enjoyed by abutting neighbors to the east and west.

The ANC testified that the applicants have not demonstrated that the deck would not be of substantial detriment to the public good. It will reduce the light and air of the applicants' neighbors and it looms 50 feet above the property to the south.

4. Whether allowing the deck would impair the intent, purpose or integrity of the zone plan?

The applicants maintain that allowing the deck would be consistent with the zone plan because its size and design are consistent with the many other decks in the area.

The Office of Planning stated that the deck reduces the rear yard depth by more than 50 percent and creates a nonconformity on the site. Therefore, OP believes that the deck addition substantially impairs the intent and purpose of the zone plan for the R-1-B District.

The ANC stated that granting the application would not be consistent with the intent and integrity of the zone plan because the deck considerably reduces the level of privacy enjoyed by abutting neighbors to the east and west. It also impacts properties to the south. Finally, it would create new nonconformities on the property - to the detriment of zoning.

FINDINGS OF FACT:

Based on the evidence of record, the Board makes the following findings of fact:

1. There are lots in the area of the site that are similar in size to the subject lot.
2. There are other lots in the area with slopes at the rear of the site.
3. There are other structures in the area that are set back as far on their lots as the subject structure.
4. The applicant can make reasonable use of the property by constructing, as a matter of right, a deck four feet high, below the main level of the house.
5. It would not constitute a practical difficulty for the applicants to walk down steps from the main level of the house to the deck.
6. The lack of a secure play area outdoors at the main level of the house is not a practical difficulty related to the property.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and evidence of record, the Board concludes that the applicants are seeking an area variance to construct a deck addition at the rear of 3038 Newark Street, N.W. in an R-1-B zone.

Granting such a variance requires a showing through substantial evidence of a practical difficulty upon the owner arising out of some unique or exceptional condition of the property such as exceptional narrowness, shallowness, shape or topographical conditions. The Board further must find that the application will not be of substantial detriment to the public good and will not substantially impair the intent, purpose and integrity of the zone plan.

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The Board concludes that the applicant has not met this burden of proof. The Board concludes that the subject property is not unique because there are other properties nearby with similar characteristics related to size, width, topography and location of the house on the lot.

The Board is of the opinion that the applicants' do not face a practical difficulty related to any unique or exceptional condition of the property.

The Board concludes that to grant the variance relief would be of substantial detriment to the public good and would impair the intent, purpose and integrity of the zone plan.

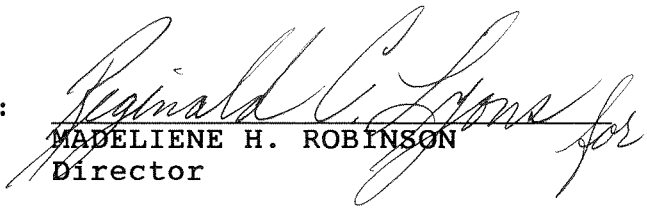
The Board concludes that it has accorded the Advisory Neighborhood Commission the "great weight" to which it is entitled.

In light of the foregoing, it is ORDERED that the application is hereby DENIED.

VOTE: 3-1 (Craig Ellis, George Evans and Laura M. Richards to deny; Angel F. Clarens opposed to the motion).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:

  
MADELIENE H. ROBINSON  
Director

FINAL DATE OF ORDER: MAY 25 1995

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

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GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 15843

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on MAY 25 1995 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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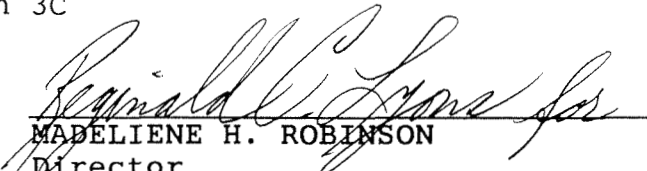
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MADELIENE H. ROBINSON  
Director

DATE: MAY 25 1995